Supreme Court, U.S.
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No. 95-120

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

Joan Carstensen,

Petitioner,

v.

CORRECTED COPY

Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents' opposition is based on two incorrect factual premises that infect, and render invalid, all of their arguments about why this petition should be denied. First, respondents claim that "[p]etitioner seeks to establish a state common law rule that would require propeller guards on all recreational boats." Opp. at 25. Second, respondents repeatedly suggest that the Coast Guard "affirmatively decided" that propeller guards should not be permitted on any boats. *See, e.g., id.* at 13-16. Based on these factual premises, respondents contend that petitioner's state common-law claim "conflicts directly and substantially with [the Coast Guard's] expert federal determination." *Id.* at 24. This alleged conflict is at the core of respondents' arguments about why this case is distinguishable from *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and why the Texas Supreme Court's decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is an "aberration" that does not create a sufficient basis for review by this Court. *Opp.* at 16, 21.

In fact, however, neither of the factual premises relied upon by respondents is correct. First, petitioner does not in any way seek to establish a common law rule "that would require propeller guards on all recreational boats." *Id.* at 25. To the contrary, all petitioner seeks to establish is that respondents should be liable for damages for having failed to install a propeller guard on the *particular* model at issue. A ruling in petitioner's favor on this point would not establish any mandatory requirement that all boat manufacturers must install propeller guards on all boats; indeed, it would not even require respondents to install such guards on the particular boat at issue. Rather, such a ruling would only require that respondents compensate petitioner for her injuries.

Second, the Coast Guard never even *considered* whether propeller guards should be banned on all -- or even *any* -- boats. Rather, the agency only considered whether to attempt to develop a universal, across-the-board *requirement* for propeller guards on

all boats. Ultimately, the Coast Guard decided not to issue such a requirement because it concluded that there was no technology appropriate for a national, one-type-fits-all regulation applicable to *all* types of boats. *See* App. 12. There was never any decision that propeller guards were dangerous for each and every boat, or that their use should be restricted in any way.

Thus, respondents' factual arguments about the conflict between the relief sought by petitioner and the Coast Guard's decision not to regulate propeller guards simply are not true. Simply put, there is no inconsistency whatsoever between petitioner's state common-law claim -- that her boat was defective because it lacked a propeller guard -- and the Coast Guard's decision not to mandate the use of propeller guards on all boats. Rather, the only conflicts here are between the decision below, this Court's decision in *Myrick*, and the decision of the Texas Supreme Court in *Moore*.

I. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND *MYRICK*.

Respondents' principal argument in opposition is that review is unwarranted because there is no conflict between the Eighth Circuit's ruling in this case and *Myrick*. They claim that the Coast Guard's decision not to require propeller guards has preemptive force because, unlike the agency decision in *Myrick*, "there is conclusive evidence that 'the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from' requiring propeller guards." Opp. at 13 (quoting *Myrick*, 115 S. Ct. at 1487). This "affirmative decision" not to regulate, in respondents' view, has preemptive effect even though the Coast Guard has never prescribed any regulation banning (or even addressing) the use of propeller guards.

This argument is baseless. First, *Myrick*'s holding was grounded in the simple fact that -- as in this case -- there was *no federal standard in place regarding the product at issue*. This

Court held that preemption does not lie where "[t]here is simply no minimum objective standard stated at all." 115 S. Ct. at 1487. This common sense proposition is the core holding of *Myrick*, and it applies with full force in this case: the unavoidable truth is that, as in *Myrick*, the Coast Guard has not issued *any* "minimum objective standard" with respect to propeller guards. Moreover, as in *Myrick*, "there is no evidence that [the Coast Guard] decided that [propeller guards] should be free from all state regulation . . .." 115 S. Ct. at 1487. To the contrary, the record reveals that the Coast Guard never intended its action to have *any* effect on state power. *See* Petition at 14. *Myrick* made clear that there is no preemption under these circumstances; the fact that the Coast Guard decided not to require propeller guards on all boats is irrelevant.

Respondents also attempt to distinguish *Myrick* on the ground that the Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, and the Boat Safety Act are "completely different." Opp. at 1. In fact, however, on the issue relevant to *Myrick*, the statutes are exactly the same: they both contain express preemption provisions that only apply when a federal regulation is in effect. *Compare* 46 U.S.C. § 4306 (Boat Safety Act preemption provision applies when there is "a regulation prescribed under section 4302 of this title.") *with* 15 U.S.C. § 1392(d) (Motor Vehicle Safety Act preemption provision applies "[w]henever a Federal motor vehicle safety standard is in effect . . .").[1] In this case, no such regulation has ever been prescribed with respect to propeller guards on boats. *Myrick*, therefore, controls.

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[1] In addition, unlike the statutes relied on by respondents, *see* Opp. at 20-21, both the Motor Vehicle Safety Act and the Boat Safety Act contain express anti-preemption provisions explicitly *preserving* common law claims. *Compare* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.") *with* 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.")

Respondents attempt to counter this fact by arguing that, even though no regulation has been prescribed, the Coast Guard's decision not to prescribe one was the product of a formal rulemaking proceeding. *See* Opp. at 14 n.11. This contention, however, is baseless. To begin with, as *Myrick* makes clear, the existence of formal rulemaking has nothing to do with whether state law is preempted. (Indeed, there were extensive formal rulemaking proceedings in *Myrick*.) There must be an actual regulation in place.

Moreover, the Coast Guard never even begun, much less completed, a formal rulemaking process with respect to propeller guards. There was no "notice of proposed rulemaking [published] in the Federal Register," 5 U.S.C. § 553(1); no "opportunity to participate" in a formal rulemaking proceeding, *id.* § 553(2); and, of course, no publication of any "substantive rule" banning the use of propeller guards on boats. *Id.* § 553(3).[2] Even a computerized

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[2] Respondents argue that the Coast Guard is not obligated to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (the "APA") because the Boat Safety Act merely directs the agency to "prescribe regulations." Opp. at 16. Presumably, what respondents deem significant is the absence of the verb "to promulgate," which is the term employed in the APA with reference to rulemaking. *See* 5 U.S.C. § 553. This is, however, a distinction without a difference. It is well established that the APA's rulemaking provisions apply with full force to all "substantive rules" that have "substantive legal effect." *FLRA v. U.S. Dep't of Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992); *see also Telecommunications Research and Action v. F.C.C.*, 800 F.2d 1181, 1186 (D.C. Cir. 1986). It is difficult to imagine a more "substantive" rule than a decision by the Coast Guard to *ban* the use of propeller guards throughout the United States. The notion that such a rule would somehow be exempt from the APA because Congress used the word "prescribe," rather than "promulgate," is baseless. (Not surprisingly, respondents cite no authority for this creative proposition.) In any event, other provisions of the Boat Safety Act and its legislative history make clear that Congress did intend the Coast Guard to prescribe safety regulations in accordance with the procedures of the APA. *See* 46 U.S.C. § 4302(b) ([e]ach regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published"); S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, at 6 (safety standards to be issued under the Boat

search of the *Federal Register* and the *Code of Federal Regulations* -- the official U.S. government publications that contain all federal regulatory determinations -- yields no hint that the Coast Guard ever took any action to ban states from requiring propeller guards. It defies logic to contend that the Coast Guard preempted state regulation of propeller guards in secret -- yet that is precisely the upshot of respondents' theory in this case.

Finally, respondents argue that *Myrick* does not apply because the Coast Guard "made an 'affirmative decision,' based on considerations of safety, that propeller guards should *not* be required on propeller guards." Opp. at 16. This contention is belied by the facts. As explained above, the agency never even considered whether to *ban* propeller guards on boats. Rather, as respondents concede, the whole point of the agency's internal deliberations was to decide whether to *require* "some form of propeller guard." Opp. at 5. The agency's decision not to issue such a requirement is hardly the sort of "inaction joined with action" that has been held to preempt all applicable state law.

Regardless of how one characterizes the Coast Guard's proceedings, the bottom line is that the agency has never prescribed a "regulation . . . under section 4302." 46 U.S.C. § 4306. That being so, as in *Myrick*, the states are free to act. If respondents' contrary reading of *Myrick* carries the day, then any agency decision not to commence rulemaking with respect to a safety standard could have preemptive force -- even if the agency never intended to limit states' power in any respect. This would place federal agencies in a Catch 22, whereby a decision not to *require* a particular device could take on the same force of law as a formal regulation *banning* the use of such a device nationwide. If *Myrick* means anything, it means that there can be no preemption under these circumstances.

Safety Act must be "*promulgated* by the Secretary of the Department in which the Coast Guard is operating -- presently the Secretary of Transportation") (emphasis added).

II. THERE IS A CLEAR SPLIT BETWEEN THE DECISION BELOW AND *MOORE*.

Respondents' second argument is that there is no conflict in the lower courts meriting review because the Texas Supreme Court's decision in *Moore* was "premised, in large part, on a cramped view of federal preemption that was subsequently rejected in *Myrick*." Opp. at 18. Respondents also claim that *Moore* was an "aberration," and in direct conflict with scores of other decisions regarding federal preemption. *See id.* at 18-24. Both claims are meritless.

First, contrary to respondents' contention, *Moore's* analysis was unaffected by *Myrick*, and stands in direct conflict with the Eighth Circuit's decision in this case. *Myrick* clarified that the mere presence of an express preemption clause in a statute, without more, does not preclude any inquiry into implied preemption. *See* 115 S. Ct. at 1488. Respondents argue that this holding "completely undermined" the Texas Supreme Court's holding in *Moore*. *See* Opp. 18. However, *Moore* included an analysis of *both* express *and* implied preemption under the Boat Safety Act. *See* Petition at 17-18. Because *Moore* reached the issue of implied preemption, there can be no claim that the Texas Supreme Court's decision was rendered invalid by *Myrick*. With or without *Myrick*, *Moore* stands in direct conflict with the decision below.[3]

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[3] We note that petitioner does not read *Myrick* as compelling an inquiry into implied preemption analysis in this case; to the contrary, petitioner believes that such an inquiry is *precluded* under the Boat Safety Act. In *Myrick*, this Court held that "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies' -- i.e. supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." 115 S. Ct. at 1488. However, in the Boat Safety Act, Congress did not simply enact an express preemption clause that "implies," but leaves open the question of whether, "other matters" are preempted. *Id.* Rather, it enacted an express *anti*-preemption provision (the savings clause, 46 U.S.C. § 4311(g)) that explicitly preserves common law

Nor is there any basis for respondents' claim that *Moore* is somehow "aberration[al]" and in conflict with numerous other preemption decisions. *See* Opp. at 18-24. On this point, respondents' first argument is that *Moore*'s holding "is wholly at odds with this Court's decision in *Cipollone [v. Liggett Group*, 112 S. Ct. 2608 (1992)], which eliminated any doubt about whether the state 'law or regulation' referred to in the preemption provision of the Act, 46 U.S.C. § 4306, includes state common law." Opp. at 18. However, in *Cipollone*, this Court considered the preemptive effect of an entirely different statute -- the Public Health Cigarette Smoking Act of 1969. That Act modified the preemption provision of an earlier statute to provide that "'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the] Act.'" *Id.* at 2617. In considering this language, the Court acknowledged the general presumption against preemption, but concluded that it was constrained to interpret the phrase "State law" in the preemption provision of the 1969 Act to encompass state common law because the earlier version of that very Act had less restrictive preemption language that did not encompass state common law. In light of this history, *Cipollone* concluded that Congress, by enacting the broader language in the 1969 Act, intended to preempt some state common law tort claims. *Id.* at 2621.

The Boat Safety Act has no comparable history indicating an intent on Congress' part to preempt common law claims. To the contrary, when it enacted the Boat Safety Act, Congress made clear its intention *not* to preempt such claims by including an express, *anti*-preemption provision that expressly *preserves*

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claims. It is the existence of this savings clause that precludes implied preemption under the Safety Act. In any event, the Texas Supreme Court *did* reach the issue of implied preemption in *Moore*, and thus its decision cannot be said to conflict with *Myrick* regardless of how one interprets this Court's ruling in that case.

common law claims. *See* 46 U.S.C. § 4311(g). Unlike the Boat Safety Act, the statutes at issue in *Cipollone* did not contain provisions expressly preserving common law claims. In analyzing those statutes, however, the Court explicitly noted that its task would be far simpler if they did:

> [T]here is no general inherent conflict between federal pre-emption of state warning requirements and the continued validity of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986, Congress expressly preempted State or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, *preserved state law damages actions based on those products*. See 15 U.S.C. § 4406.

Id. at 2618 (emphasis added). Given the existence of such a savings clause in the Boat Safety Act, the Supreme Court's rationale in *Cipollone* actually *requires* a finding of no preemption here. Respondents' argument that *Cipollone* compels a contrary result is simply wrong.[4]

Respondents also argue that *Moore* must be wrong because the Boat Safety Act's savings clause (1) was only intended to "negate[ ] an affirmative defense of compliance with a government standard"; and (2) merely expresses "Congress' intent not to

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[4] In an attempt to bolster their interpretation of *Cipollone*, respondents argue that "the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous other federal health and safety statutes . . ." Opp. at 20. This argument is unavailing, since none of the cases cited by respondents involves claims under the Boat Safety Act -- a statute that has a narrow preemption provision *and* an extremely broad savings clause that expressly preserves all common law claims.

occupy the entire field of boat safety. . ." *Opp.* at 22-23. These alternative interpretations, however, make no sense. First, there was no reason for Congress to include a provision in the Safety Act for the sole purpose of "negat[ing] a[n] affirmative defense of compliance with a government standard." At the time the Boat Safety Act was enacted (and still today), it was already the law in every state that compliance with a federal regulation is *not* an absolute defense in an action for negligent failure to do more.[5] Since the law was already clear on this point, respondents' interpretation would render the savings clause a nullity.

It would have been equally senseless for Congress to include a provision in the Safety Act indicating its intent "not to occupy the entire field of boat safety." Opp. at 22. Under the Boat Safety Act, Congress merely authorized -- but did not require -- the Coast Guard to prescribe minimum safety standards regulating boat safety. There was no indication that Congress intended to *prohibit* all state regulation in the event that the Coast Guard failed to act -- *i.e.*, to occupy the entire field of boat safety. Moreover, respondents' interpretation cannot be squared with the preemption provision, which applies only when there is a "regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306. Thus, the preemption provision is limited to situations where state and federal regulations *address the same matter*; it cannot be read to give rise to any broader "field" preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings clause to address, and affirmatively negate, the prospect of such broader field

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[5] *See* Restatement (Second) of Torts § 288C (1964). *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989) ("[f]or a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with government statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citing Restatement) (footnotes omitted).

preemption.

Finally, respondents argue that *Moore* was aberrational because it "relied on the traditional 'presumption against preemption [of] * * * state regulation of health and safety matters'" -- a presumption that, in respondents' view, is "entirely misplaced in the context of the Boat Safety Act." Opp. at 24. Once again, it is respondents' interpretation that is incorrect. This is a lawsuit seeking damages for personal injuries under state common law. This Court has repeatedly reaffirmed that such a suit is entitled to a "strong presumption against pre-emption" to protect states' rights to govern their own affairs. *Cipollone*, 112 S. Ct. at 2621. Respondents seek to jettison that presumption and, instead, create a strong presumption in *favor* of federal preemption arises simply by virtue of federal agency inaction. That approach should not be tolerated here.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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